84-1717

No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL ROBERT QUINN

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Whether the sole owner of a boat has standing under the Fourth Amendment to contest the seizure and search of this boat based upon the combined factors that he was the registered and actual owner of the boat, that the boat was pursuing the objectives of the owner's joint venture at the time of the search, that the particular items seized belonged to the owner of the boat, and that reasonable precautions were taken to preserve the privacy of the boat.

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OPINION BELOW

The Opinion of the court of appeals (App., infra, 1a-4a) is reported at 751 F.2d 980.

JURISDICTION

The judgment of the court of appeals (App., infra, 4a) was entered on November 2, 1984. A petition for rehearing was denied on February 1, 1985, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including May 2, 1985. The jurisdiction of this Court is invoked under 28 U.S.C.1254(1)

STATEMENT

On August 4, 1983, a four count indictment was returned in the United States District Court for the Northern District of California. Count One of the indictment charged respondent MICHAEL QUINN with violating Title 21, U.S.C. section 952(a) (importation of a controlled substance). Count Two charged a violation of Title 21, U.S.C. section 841(a)(1) (possession with intent to distribute marijuana), and Counts Three and Four of the indictment charged conspiracies to import marijuana and to possess marijuana with intent to distribute it, respectively. (E.R. pages 1-3).[1]

On November 18, 1983, the trial court denied respondent QUINN's motion to suppress all evidence seized as a result of the search of the fishing

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1. "E.R." refers to Respondent's Excerpt of Record in the Court of Appeals.

vessel "Sea Otter" that occurred when the port holds of the vessel were pumped out by Government officials after the forcible seizure of the vessel. (E.R. page 4-28) (R.T. page 2-3)[2]

Following the district court's denial of the suppression motion on grounds of "standing," respondent entered a conditional plea of guilty to Count Three of the indictment pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure. At that time, respondent specifically reserved on appeal, with the concurrence of the Government, the issue of whether he had standing to move to suppress evidence illegally seized from the "Sea Otter" in June, 1979. Respondent was sentenced to three years imprisonment, fined $15,000.00 and ordered to forfeit a ranch and boat that were involved

2. "R.T." refers to Reporter's Transcript of the Record in this case.

the drug smuggling enterprise.[3] The Court of Appeals reversed the District Court's decision on the issue of "standing," and remanded for disposition of respondent's suppression motion on the merits.

In connection with the Government's response to respondent QUINN's motion to suppress, the Government submitted a statement of facts together with the affidavit of Wesley Dyckman, which constituted the record in this case. (E.R. pages 10-12, 22-27).

In 1978, respondent QUINN approached George Hunt in Costa Rica to participate in a scheme to import marijuana by boat from Columbia to Humboldt County, California. Mr. Hunt was to take the vessel owned by respondent, pick up a load of marijuana, bring it to respondent's

3. The government has never contested respondent's "standing" to contest to theforfeiture of the "Sea Otter" which was done as part of the overall resolution of the case.

ranch in Humboldt County, and thereafter off-load the marijuana at the ranch. In this regard, respondent purchased the "Sea Otter," a fishing vessel, in San Diego, California. (E.R. page 23). In connection with the purchase of the "Sea Otter," respondent also registered himself as the owner of the vessel.

In the spring of 1979, respondent provided the "Sea Otter" to three South Americans who had been recruited by Hunt. The Sea Otter then pursuant to the joint venture, took on a load of marijuana off the West Coast of Columbia. Respondent was the co-owner of this marijuana. The "Sea Otter" proceeded North until it was off the coast of Humboldt County. At that time, pursuant to Mr. Hunt's and respondent's previous agreement, Mr. Hunt contacted respondent by radio. The marijuana was subsequently off-loaded at Spanish Flat

in the vicinity of respondent's ranch. Due to bad weather, the ship was forced to port in Drake's Bay. (E.R. page 10,23). At Drake's Bay, California Fish and Game officers boarded the "Sea Otter," purportedly to search for "illegal abalone." The next morning, the officers returned, inspected the vessel, and apparently called the Coast Guard. Thereafter, Customs patrol Officers on board a United States Coast Guard cutter intercepted the "Sea Otter" and boarded it. The vessel was thereafter seized, and taken to the United States Coast Guard Station at Yerba Buena Island. There, the forward holds of the vessel were pumped out and marijuana residue was found. Hunt and the other crew members were arrested, but were later released after formal charges were not brought. (E.R. pages 11-12, 24). Thereafter, the "Sea Otter" underwent extensive repairs

in the Bay Area for approximately nine months. The "Sea Otter" was turned over to respondent in Punta Arenas, Costa Rica in November, 1981.

On August 9, 1983, respondent was arrested while living on board the fishing vessel "Sea Otter", in San Diego, California.

In the district court, respondent filed a motion to suppress evidence obtained as a result of the seizure and search of the "Sea Otter." At that time, the district court denied the motion, finding that respondent lacked standing to contest the search and seizure of the vessel. Additionally, at that time, defense counsel requested an opportunity to call Mr. Hunt as a witness to testify in connection with respondent's standing and expectation of privacy in the vessel. Defense counsel noted that Mr. Hunt was beyond

the subpoena power of respondent at that time, and requested an opportunity to renew that motion when Mr. Hunt became available. A conditional plea of guilty was entered and Mr. Hunt was never brought into the United States.

On appeal, the Panel of the Ninth Circuit reversed the district court's finding. The majority concluded that respondent had demonstrated a legitimate expectation of privacy in the "Sea Otter," which entitled him to challenge the validity of the search. The court based this on the conjunction of the following factors:

(1) His ownership of the boat;

(2) His possessory interest in the marijuana seized;

(3) The fact that the boat was pursuing the purpose of QUINN's joint venture at the time of the search; and

(4) That reasonable precautions were taken to preserve the privacy of the boat.

In accordance with this conclusion, the Court of Appeals remanded the case to the district court for consideration of the merits of respondent's motion to suppress.

REASONS FOR DENIAL OF THE PETITION

(A) THE INSTANT PETITION PREMATURELY RAISES THE ISSUE OF STANDING.

The jurisdiction of the Ninth Circuit Court of Appeals was based upon 28 U.S.C. section 1291 which allows appeals from final decisions. The Court of Appeals remanded the instant case to the district court for further proceedings regarding respondent's motion to suppress evidence. Thus, the review of the instant issue of standing does not meaningfully and timely raise an issue for this Courts review. The case has not been finally decided by the district court on the merits of the motion to suppress evidence. Accordingly, contrary to petitioner's assertion, resolution of the "standing" issue will not necessarily be the end of proceedings in this matter. The Government has concluded that the Govern-

ment's principal witness has left the country and is no longer available to testify.[4] As is evidenced in the dialogue occurring at the time of the motion to suppress evidence, the Government's principal witness was already out of the country and was anticipated to

4. This unfortunate misrepresentation in the Solicitor's brief should be corrected. George Hunt pled guilty before Mr. Quinn's arrest in August 1983, and was sentenced to a probationary sentence. He was permitted to return to Costa Rica, from which he had earlier been extradicted. Hunt was in Costa Rica during the entire pendency of the District Court proceedings in this case. At all times though, and at the present time, Hunt was required pursuant to his plea agreement and as a condition of his probation (a term of five years) to return to the U.S. to testify as a government witness, if necessary, in the trial of Mr. Quinn. Thus, while he is out of the country, he is clearly "available" to testify. Should he refuse, the government can seek recission of his plea agreement or revocation of his probation and activate the extradition process that secured Hunt's initial appearance. Hunt was willing to testify for the government during the District Court proceedings. There is no indication that he has changed his position.

return to the country for the purpose of trial. Thus, circumstances have not changed which render a determination of the instant issue any more final than any other inter-locutory appeal. The Government has also suggested that even if they prevail on the merits of the suppression motion, it would be unable to proceed with the prosecution. This assertion is speculative at best, and again, is contrary to record in the instant case. Finally, if the motion to suppress is granted, the Government will have the oportunity at that time to appeal the instant issue. In light of the total circumstances available, review of the instant issue is premature and therefore certiorari should be denied.

(B) A REVIEW BY THIS COURT WOULD INVOLVE A REVIEW OF A COMPLEX SET OF FACTS AND CIRCUMSTANCES WHICH ARE NOT LIKELY TO RECUR.

The Ninth Circuit rendered its opinion based upon a combination of four specificfactors in existence in this particular case. The court based its opinion not upon the exclusive ownership or the possessory interests in a joint venture, but on a combination of all four factors existing at the time of the search of the "Sea Otter." Contrary to petitioner's contention, this situation is particularly unique to the instant case, and is not likely to recur. Of particular significance is the lack of any other authority dealing with the combination of these four particular factors in a determination of a respondent's reasonable expectation of privacy in the vessel searched.[5]

5. The suggestion that the Court used its limited resources to review fact-bound determination of a unique decision should be rejected.

Petitioner can point to no other cases dealing with such a combinations of factors. All of the opinions cited by Petitioner are distinguishable on these particular factors. Petitioner cites a number of opinions for the proposition that ownership in the vessel alone does not create a reasonable expectation of privacy. Petitioner also cites a number of opinions for the fact that participation in a joint venture alone does not create a reasonable expectation of privacy in the vessel. Finally, Petitioner cites cases to the effect that a possessory interest in the contraband seized, standing alone, does not create a reasonable expectation of privacy. None of these cases deal with the combinations of factors considered in conjunction with the reasonable precautions taken and recognized by the Ninth Circuit as

creating an expectation of privacy in the area searched.

In Rakas v. Illinois, 439 U.S. 128 (1978), the Court noted:

> It should be emphasized that nothing we say here casts the least doubt on cases which recognize that, as a general proposition, the issue of standing involves two inquiries; first, whether the proponent of a particular legal right has alleged 'injury in fact,' and, second, whether the proponent is asserting his own legal rights and interests rather than basing his claim for relief upon the rights of third parties.
>
> Rakas v. Illinois, supra, at page 139.

Implicit in all rulings regarding the determination of standing, is that the totality of circumstances must be considered to determine the expectations of privacy exercised by a claimant. The Court of Appeals clearly was proper in applying this Court's decisions

to the facts of this case, eschewing sole reliance on a single factor, and instead evaluating the totality of the circumstances in light of Rakas and Salvucci. Petitioner totally ignores the combination of factors suggested by the Ninth Circuit, in an attempt to convince this Court that certiorari is in order due to a recurring situation. However, the true facts of the case, indicate that this is not a situation likely to recur, but is in fact a particularly unique case where a combination of several, not one, factors indicated a legitimate expectation of privacy in the vessel searched. Absent the recurrence of such factors, the instant petition does not present an important question of law, but rather a unique factual argument which will not have an important impact or precedential value. Accordingly, this does not

present an appropriate case for granting of certiorari.

(C) THE OPINION BELOW DOES NOT CREATE A CONFLICT OF OPINIONS AMONG THE CIRCUITS OR CONFLICT WITH EXISTING LAW OF THIS COURT.

(1) Ownership alone in the place searched is clearly not determinative of the issue of standing. See Rawlings v. Kentucky 448 U.S. 98, 105, 100 S.Ct. 2556, 2561, 65 L.Ed 2d 633 (1980); Mancuse v. DeForte, 392 U.S. 364, 368, 88 S.Ct. 2120, 2123, 20 L.Ed 2d 1154 (1968); Katz v. United States, 389 U.S. 347, 353, 88 S.Ct. 507, 512, 19 L.Ed 2d 576 (1967). However, property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated. United States v. Salvucci, 448 U.S. 83, 91, 100 S.Ct. 2547, 2553, 65 L.Ed. 2d 619 (1980); United States v. Perez, 689 F.2d 1336, 1338, (9th Cir. 1982) (per curiam); United States v. One 1977 Mercedes Benz, 708 F.2d 444 (9th

Cir. 1983). The court in Rakas recognized that expectations of privacy may be legitimized "by reference to concepts of real or personal property law, or to understandings that are recognized and permitted by society", each having varying strength depending upon the circumstances of each case. Rakas, 439 U.S. at 143-44 nt.12, 99 S.Ct. at 430-431 nt.12. For example, the right to exclude others may give rise to a legitimate expectation of privacy and may or may not stem from property interests. Any precautions taken to exclude others or otherwise maintain a privacy interest will heighten the legitimate expectation of privacy in the protected area. See Rawlings, 448 U.S. at 105, 100 S.Ct. at 2561; United States v. Chadwick, 433 U.S. at 11, 97 S.Ct. at 2483.

Essentially a defendant must demon-

strate a violation of his legitimate expectation of privacy in the items seized and in the place searched. This determination involves two inquiries: first whether the defendant has exhibited an actual, subjective expectation of privacy, and second, whether that expectation is one that society is prepared to recognize as reasonable. Smith v. Maryland, 442 U.S. 735, 740, 99 S.Ct. 2577, 2570, 61 L.Ed.2d, 220 (1979).

A defendant who enters into an arrangement that indicates joint control and supervision of the place searched may challenge a search of the place where contraband is concealed. United States v. Pollock, 726 F.2d 1456 (9th Cir. 1984); United States v. Johns, 707 F.2d 1093, 1099-1100 (9th Cir. 1983).

In United States v. Brown, 743 F.2d 1505 (11th Cir. 1984), the court

noted:

> Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law, or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others.
>
> . . .
>
> Our Circuit has recognized that ownership, or at least the right to exclude others, to control access to the place searched is an important feature of a legitimate privacy expectation.
>
> United States v. Brown. supra, at page 1510.

The cases cited by Petitioner to the effect that ownership alone is not determinative of the issue deal with situations wherein the owner was temporarily excluded. In United States v. Dall, 608 F.2d 910 (1st Cir. 1979), cert. denied 445, U.S. 918, 100 S.Ct.

1280, 63 L.Ed.2d 603 (1980), the court held ownership alone was insufficient to establish an expectation of privacy where the owner of the truck had lent the truck to some friends. The owner disclaimed any knowledge of the contents of the property found in a locked camper on the truck bed and did not allege that he had locked the camper. The court held that when the owner gave possession to another for the other's uses to the temporary exclusion of the owner, he extinguished the expectation of privacy in that truck which would have arisen due to his ownership. Similarly, in United States v. Dyar, 574 F.2d 1385 (5th Cir. 1977) cert. denied 439 U.S. 992, 99 S.Ct. 570, 58 L.Ed.2d 653 (1978), the Fifth Circuit held that defendants who asserted a leasehold interest in an airplane sufficient to create a traditional property

right abandoned any expectation of privacy when they gave possession of the plane to a pilot. Here, the ownership of the property was not the sole basis for respondent's claim of standing. In contrast to the opinions cited by petitioner, not only did respondent exercise an ownership interest in the fishing vessel, but he also demonstrated an expectation of privacy in the uses of the fishing vessel. These factors also should be taken into consideration as well as the efforts made to conceal the contents of the holds of the vessel by flooding it. The instant opinion does not rely exclusively on the ownership of respondent and accordingly does not create a conflict among Circuits or fundamental error which is inconsistent with the prior opinions of this court. Rather, to the contrary the opinion accurately addresses the

previous rulings of the Court.

(2) Petitioner asserts that the Ninth Circuit's consideration of defendant's participation under joint criminal venture creates a conflict between the decisions of Courts of Appeals of the other Circuits. The cases cited are all distinguishable on their face to the extent that each and every case dealt with a claim of standing based exclusively upon the defendant's participation in a joint criminal venture. See, for example, United States v. Manbeck, 744 F.2d 360, 373-374 (4th Cir. 1984) cert. denied, No. 84-1194 (February 19, 1985) (defendant had no standing to contest search of tractor/-trailer and other vehicles based exclusively on their possessory interest in the marijuana and their joint venture in a smuggling operation in which they would share the profits of the marijuana.

No claim of ownership in the vehicle searched, presence at the time of search or other factors were cited by the defendant); United States v. Brown, 744 F.2d 1505, 1506-1507 (11th Cir. 1984) (joint claim of possession in cocaine concealed upon the person of the co-defendant pursuant to the joint actions of both did not create a reasonable expectation of privacy where no expectation of privacy could be asserted in the person of the co-defendant); United States v. Knotts, 662 F.2d 515, 518 (8th Cir. 1981), reversed on other grounds, 460 U.S. 276 (1983) (defendant did not have standing to contest search of co-defendant's cabin where only basis for claim of standing was that he was a co-venturer in a manufacturing venture and asserted a possessory interest in equipment located in the cabin); United States v. DeLeon, 641 F.2d 330,

337 (5th Cir. 1981) (defendant did not have standing to contest search of black bag found in front seat of car in which defendant claimed no interest, and where bag had been taken from defendant who only claimed a possessory interest in the contents of the bag); United States v. Davis, 617 F.2d 677, 690 (D.C. Cir. 1979), cert. denied 445 U.S. 967 (1980) (no standing where defendant argued solely on the interest he claimed as a consignor of cocaine located in the co-defendant's apartment; defendant had consigned the cocaine with the expectation that the drug would be shown to prospective buyers); United States v. Archbold-Newball, 554 F.2d 665, 678 (5th Cir. 1977), cert. denied 434 U.S. 1000 (1977) (no standing where defendant merely asserted a possessory interest in the contraband located during the search

of the co-defendant's hotel room at a time when defendant was not present); United States v. Galante, 547 F.2d 733, 739 (2nd Cir. 1976), cert. denied, 431 U.S. 969 (1977) (no standing in warehouse where no assertion of ownership of warehouse, or proprietary or possessory interest in warehouse and defendant not present at warehouse); United States v. Hunt, 505 F.2d 931 (5th Cir. 1974), cert. denied, 421 U.S. 975 (1975) (defendant did not have standing to contest search and seizure of tape recorders where defendants did not even know of existence of tapes at time until after search; based merely upon co-venturer's status).

None of these opinions even purported to address issues of proprietary interest coupled with other factors demonstrating a reasonable expectation in the place to be searched. Rather, all cases

merely addressed the very narrow question of whether a status as a co-venturer in a conspiracy provided them with personal standing within the meaning of the Fourth Amendment. Similarly, the cases cited for the proposition that there is no reasonable expectation of privacy in the hold of a boat do not involve situations in which precautions are taken to conceal the contents thereof. The opinions cited as demonstrated do not create a conflict of law with the instant case, and accordingly, certiorari should not be granted.

Moreover, the decision of the Ninth Circuit is entirely supported by other circuit law. In United States v. Shaefer, Michael & Clairton, 637 F.2d 200 (3d Cir. 1980), defendant, a corporate manufacturer of asphalt paving materials, challenged the search and seizure of five trucks carrying

asphalt. In ruling that the president of the corporation did have a reasonable expectation of privacy in the trucks, the court stated:

> Here, in contrast, Shaefer owns the trucks which were seized, and Clairton Slag, Inc. had at the time of the seizure a possessory interest in them, exercised through its driver agents. Moreover, Clairton had property and possessory interests in the weigh bills which were seized and copied. Neither Clairton's corporate status nor its commercial activity puts is outside the protection of the Fourth Amendment. (citations omitted)

The Government argues that neither defendant was present at the time of the seizure, and thus that neither defendant has a "privacy" interest which was invaded. But the Fourth Amendment's prohibition against seizures of property does not depend upon presence of the owner. The court has repeatedly found Fourth Amendment violations in police intrusion into unoccupied vehicles.

United States v. Shaefer, Michael and Clairton, supra, at page 203.

In United States v. Perez, 689 F.2d 1336 (9th Cir. 1982), the Ninth Circuit consistently held that defendants had standing with respect to a pick-up truck based upon the combined factors of their ownership of the truck, the joint ownership in the contraband found in the truck, the truck was pursuing the purpose of the joint venture and reasonable precautions were taken to maintain the privacy of the truck.

In United States v. Haydel, 649 F.2d 1152 (5th Cir. 1981), the Fifth Circuit noted standing for a defendant in a box of gambling records kept at his parents' house under their bed. The combination of factors of ownership of the box, ownership of the items seized, and the precautions taken to

maintain privacy created a legitimate expectation of privacy within the meaning of the Fourth Amendment. The opinion below is entirely consistent with these cases and is based on the fundamentally sound proposition that no one factor is determinative of the issue of standing.

Petitioner argues that a distinction should be drawn between possessory interests in contraband and non-contraband items with only the latter being recognized as potentially giving rise to an expectation of privacy. The logical application of such a distinction completely defies any manageable application of the Fourth Amendment. To reach a conclusion of standing, the trial court would be compelled to examine the fruits of the search and in essence use the fruits themselves to justify the inapplicability of the Fourth Amendment. Moreover, the trial court would be compelled

to distinguish between mere evidence, instrumentalities, and contraband. Such a distinction has been previously rejected by this Court in Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967).

Finally, Petitioner suggests that the disposition of the property after the search had occurred should be considered in denying standing. Clearly, the determination of standing should be made at the time of the search and seizure. The fact of a law enforcement search will in many instances influence the subsequent actions taken with respect to certain property. Accordingly, Petitioner has asserted another logically unsound principle for the determination of standing. The only fundamentally correct determination of standing must be based on the totality of all circumstances existing

at the time of the search. The Ninth Circuit opinion below accurately applies this principle consistently with all other circuits and the previous opinions of this court.

CONCLUSION

The present case raises questions turning entirely on the unique facts and circumstances of the vessel, not likely to recur and without any impact outside the limits of this particular case. The opinion below consistently considers all factors known to reach the fundamentally sound conclusion that Respondent had a reasonable expectation of privacy in the "Sea Otter". Finally, in light of the premature nature of the petition, certiorari should be denied.

DATED: 7-1-85.

Respectfully submitted,

EUGENE G. IREDALE
Attorney for Respondent
MICHAEL ROBERT QUINN

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 84-1017

D.C. No. Cr-83-0493-RHS

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MICHAEL ROBERT QUINN, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Northern District of California
Honorable Robert H. Schnacke, Presiding

Argued and Submitted August 7, 1984

[Filed Nov. 2, 1984]

OPINION

Before: **BROWNING**, Chief Judge, **MERRILL** and **SNEED**, Circuit Judges

PER CURIAM.

Quinn appeals from the District Court's pre-trial ruling that he lacks standing to contest the search of his fishing vessel. We reverse. Quinn had a legitimate expectation of privacy in the place searched (his boat), giving him a basis to charge that the search invaded his Fourth Amendment rights and to call for a judicial determination of the validity of this charge. See United States v. Salvucci, 448 U.S. 83, 91-92 (1980); Rakas v. Illinois, 439 U.S. 128, 138-140, 143 (1978). was based on the conjunction of the following: marijuana seized, arising from his joint venture with Hunt for the smuggling of marijuana from the west coast of Columbia to Quinn's ranch in Humboldt County, California. Ownership

of both the place searched and the item seized conferred standing in pre-Rakas cases. See, e.g., United States v. Jeffers, 342 U.S. 48, 49-50, 54 (1951). Dual ownersip remains significant under the expectation of privacy standard. See Salvucci, 448 U.S. at 90-91 n.5; Rakas, 439 U.S. at 136.

(3) The fact that the boat, when searched, was returning from a delivery of marijuana to Quinn and was, thus, pursuing the purpose of Quinn's joint venture. See United States v. Pollack, 726 F.2d 1456, 1465 (9th Cir. 1984); United States v. Johns, 707 F.2d 1093, 1100 (9th Cir. 1983); United States v. Perez, 689 F.2d 1336, 1338 (9th Cir. 1982) (per curiam). Where a joint venture is being pursued, the mere fact that a joint venturer's absence

from the place searched is insufficient to establish abandonment or relinquishment of the property seized. See Johns, 707 F.2d at 1099-1100. Compare United States v. Mendia, 731 F.2d 1412, 1413 (9th Cir. 1984); United States v. One 1977 Mercedes Benz, 708 F.2d 444, 449 (9th Cir. 1983), cert. den. 104 S.Ct. 981 (1984) (no interest in the continuing transport of contraband deriving from a joint venture).

(4) The fact that to find the marijuana it was necessary to pump out the forward hold of the boat, indicating that reasonable precautions had been taken to preserve privacy. Compare Mercedes, 708 F.2d at 449 (contraband was "arguably in plain view").

Reversed and remanded for consideration of the merits of Quinn's motion to suppress.

SNEED, Circuit Judge, Dissenting:

I respectfully dissent. Quinn hoped, and no doubt to some extent expected, that the contraband would remain undetected. That is not enough to entitle him to invoke the protection of the Fourth Amendment. See United States v. Brown, 731 F.2d 1491 (11th Cir. 1984). Rather, the test is whether the expectation that did exist corresponds to that which would have been entertained by a reasonable, but innocent and law abiding, person having the same relationship as did the appellant to the area and objects searched. Only then is the expecatation legitimate. The Fourth Amendment protects the guilty because only by doing so can the innocent be protected. The innocent are not mere incidental beneficiaries of an amendment

designed to protect the guilty. The innocent are its primary beneficiaries; the reasonableness of any expectation of privacy should be ascertained from their stand point.

Approached is this manner, I think the district court was right. Mere ownership of the object and a joint venture to transport non-contraband (lumber, for example) would not lead a reasonable co-owner, who was neither a member of the crew nor a passenger, to expect that any papers or valuables he placed in the hold of the boat would remain private. Our decision in United States v. Johns, 707 F.2d 1093 (9th Cir. 1983), is distinguishable in that there both joint ventures exercised continuing control of the place searched. That is not the case here. This case

falls easily within the reach of United States v. One 1977 Mercedes Benz, 708 F.2d 444 (9th Cir. 1983), cert. den. sub nom. Webb v. United States, 104 S.Ct. 981 (1984).

I would affirm.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-1017
D.C. No. Cr83-0493 RHS

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

MICHAEL ROBERT QUINN, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Northern District of California

[Filed Feb. 28, 1985]

JUDGEMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudicated by this Court, that the judgement of said District Court in this Cause

be, and hereby is reversed and remanded

A TRUE COPY
ATTEST Feb. 27, 1985
PHILLIP B. WINBERRY
Clerk of Court

by: /s/ Verna Groves
Deputy Clerk

Filed and Entered November 2, 1984

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-1017
D.C. No. CR-83-0493 RHS

UNITED STATES OF AMERICA, PLAINTIFF-APPELL[EE]

vs.

MICHAEL ROBERT QUINN, DEFENDANT-APPELLANT

[Filed Feb. 1, 1985]

ORDER

Before: **BROWNING**, Chief Judge, **MERRILL** and **SNEED**, Circuit Judges

The panel has voted to deny the petition for rehearing* and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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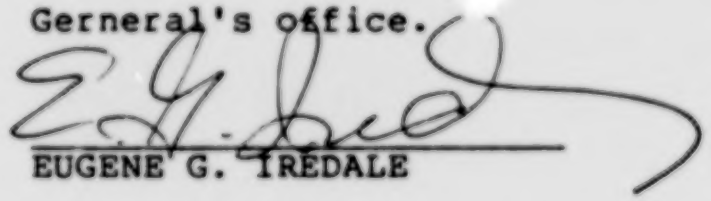
* Judge Sneed voted to grant penal rehearing.

CERTIFICATE OF SERVICE

I, EUGENE G. IREDALE, certify that I am a member of the Bar of the Supreme Court. I represent the respondent MICHAEL QUINN. Pursuant to Rule 28.5(b). I certify that on 1 July, 1985 the Opposition to Government Petition for certiorari was deposited in the U.S. Mail air mail postage prepaid to be served on the Court and the Solicitor's Gerneral's office.



EUGENE G. IREDALE